United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-5011

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter :
of :
REA HOLDING CORPORATION, :
THE EXPRESS COMPANY, INC., :
REA EXPRESS, INC., f/k/a :
Railway Express Agency, Inc., :
REXCO SUPPLY CORPORATION, :
Bankrupts, :
BROTHERHOOD OF RAILWAY, AIRLINE, :
AND STEAMSHIP CLERKS, FREIGHT :
HANDLERS, EXPRESS AND STATION :
EMPLOYEES, :
and :
WISEHART, FRIOU & KOCH, :
Appellants. :
C. Orvis Sowerwine, :
Trustee-Appellee :

Docket Nos.
77-5011 and
77-5012

REPLY BRIEF OF APPELLANT BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

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September 23, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of REA HOLDING CORPORATION, THE EXPRESS COMPANY, INC., REA EXPRESS, INC., f/k/a Railway Express Agency, Inc., REXCO SUPPLY CORPORATION, Bankrupts, BROTHERHOOD OF RAILWAY, AIRLINE, AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, and WISEHART, FRIOU & KOCH, Appellants. C. ORVIS SOWERWINE, Trustee-Appellee.	Docket Nos. 77-5011 and 77-5012

REPLY BRIEF OF THE APPELLANT
BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES

Appellant Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") submit this reply brief in response to the Appellee's brief.

Appellee states at page 10 of his brief that the issue of alleged conflict of interest has never been raised by either the

appellant BRAC or by any other creditor. Appellant acknowledges that no proceeding has been begun under Bankruptcy Rule 221. However, the conflict of interest has been raised in another context in the bankruptcy proceedings. The Trustee has brought a proceeding before the Bankruptcy Judge to disqualify the firm of Wisehart, Friou & Koch from representing interests adverse to the Trustee. In that proceeding the Wisehart firm had raised a defense asking the Bankruptcy Judge to disqualify both the Trustee and his counsel on the ground that there was a conflict of interest. Final submissions to the Bankruptcy Judge were made on February 15, 1977, which was before this allowance proceeding came on to be heard. So, at the time of the allowance hearings, the Bankruptcy Judge was fully aware that a claim of conflict of interest had been raised against both the Trustee and his counsel. It also appears that the Bankruptcy Judge has still not decided the proceeding in which the conflict of interest question was raised. Nevertheless, with full awareness that a claim of conflict of interest had been raised the Judge entertained the interim allowance proceedings but refused to allow this Appellant any opportunity to ask any questions about the claimed conflict of interest. Instead, this Appellant was restricted to asking about the time and services claimed by the Trustee and his counsel. Appellant does not doubt that both the Trustee and his counsel spent the time and rendered the services claimed in their applications. That is not the issue here. The issue is whether or not the Trustee and his counsel had a conflict

of interest which would bar the award of any allowances to them. The refusal of the Bankruptcy Judge to allow inquiry into this question has reduced the proceeding to a mechanistic formula of multiplying hours spent by an hourly rate.

The Bankruptcy Judge should have permitted inquiry into the conflict of interest claim before making any allowances. Judge Moore, speaking for this court in a recent decision involving this same bankrupt estate, has stated that "[c]onflict of interest is a conclusion and conclusions should rest upon a solid foundation of fact." Matter of REA Holding Corporation, Manning, et al. v. Sowerwine, F.2d , Dkt 76-5039 (2d Cir. July 27, 1977). But the Bankruptcy Judge, by his rulings, has denied Appellant the opportunity to discover and present any facts concerning the claimed conflict of interest. The question should have been resolved before granting interim allowances which are exceptional from the general rule of awarding compensation only at the conclusion of bankruptcy proceedings.

The allowances to the Trustee and his attorneys are reviewable by this court and should be overturned if it is shown that the allowances are arbitrary and unreasonable. BRAC submits that this court can find them arbitrary and unreasonable. The Trustee, in his application, states that he has spent 515.25 hours on the bankrupt estate over a seven month period. This amounts to a little less than 20 hours per week and the compensation comes to slightly more than $97.00 per hour. Surely in view of the fact that the estate is in liquidation, that the Trustee has been found to be in wilfull violation of I.C.C. requirements, that it appears that Chapter XI administration claims may not be paid in full, and that the proposed sale of operating rights may never take place, this court can find such a rate of compensation to be excessive and reduce it. The attorneys' fees are likewise excessive given the size of the estate. General co-counsel submitted an application which showed total time charges of $1,055, 215. Even though Judge Metzner only allowed compensation at a 50% rate, the projected hourly average rate is approximately $125.00. BRAC realizes that interim fees should be paid for the reasons set forth by the Bankruptcy Judge. However, if the attorneys are to be compensated at the rate allowed by the Bankruptcy Judge and the estate runs for another ten years, the effect on creditors will be catastrophic. Because it is excessive in the context of this estate, the award to the attorneys is unreasonable.

CONCLUSION

The order of the District Court should be reversed and the matter remanded to the Bankruptcy Judge for further proceedings.

Respectfully submitted,

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September 23, 1977

I certify that on September 23, 1977, I have caused two copies of the within reply brief to be served upon each of the following by mailing copies to them at the addresses set forth next to their names.

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